

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DOMINIC ANTHONY MARROCCO,

Plaintiff,

v.

MARK A. HILL, et al.,

Defendants.

2:12-CV-28 JCM (RJJ)

ORDER

Presently before the court is defendants Mark A. Hill and Marcellous McZeal's motion to dismiss. (Doc. #16). Plaintiff Dominic Anthony Marrocco filed an opposition. (Doc. #21). Defendants then filed a reply. (Doc. #23). After defendants filed their reply, plaintiff filed a notice of lodging of a copy of a March 1, 2012, Nevada Supreme Court case. (Doc. #24). Defendants filed a reply to this notice. (Doc. #26).

The parties before the court are also involved in a case in the district court of Harris County, Texas: *Hill v. Marrocco*, 2010-05438. (Doc. #1; *see also* Doc. #12). In the Texas action, the parties are inverted, such that the plaintiff in this case is the defendant in the Texas case, and defendant Hill is the plaintiff in the Texas case. (Doc. #12). Defendant McZeal is Hill's attorney in the Texas case. (Doc. #12).

Plaintiff's complaint stems from an admittedly false notice of lis pendens recorded by defendants, which encumbered three parcels of Clark County real property belonging to plaintiff. (Doc. #12). At the time defendants filed the false notice of lis pendens, there was no action pending

1 in Nevada affecting title to or possession of the Nevada real property. However, the notice of lis
 2 pendens stated that a “lawsuit seeks to rescind a wrongful foreclosure on lands that were purchased
 3 in Clark County, Nevada, said lands being described real property. . . .” (Doc. #12). The Texas case
 4 does not involve foreclosure or any right of defendants to the Clark County, Nevada real property
 5 identified in the lis pendens. (Doc. #12).

6 On February 13, 2012, plaintiff filed a first amended complaint, asserting four claims for
 7 relief: (1) slander of title, (2) abuse of process, (3) conspiracy, and (4) racketeering under Nevada’s
 8 RICO statute. (Doc. #12). Defendants now move to dismiss the complaint, arguing: (1) this court
 9 lacks subject matter jurisdiction; (2) defendants’ communications in the lis pendens are absolutely
 10 privileged; (3) plaintiff’s claims are compulsory counterclaims in the Texas proceeding and are
 11 improper before this court; and (4) plaintiff’s individual claims fail to state a claim upon which relief
 12 can be granted. (Doc. #16).

13 Legal Standard

14 A complaint must include a “short and plain statement of the claim showing that the pleader
 15 is entitled to relief.” FED. R. CIV. P. 8(a)(2). The statement of the claim is intended to “give the
 16 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atlantic Corp.*
 17 *v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). Courts may dismiss causes of
 18 action that “fail[] to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6).

19 The court must “accept all factual allegations in the complaint as true.” *Tellabs, Inc. v.*
 20 *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Further, the court must draw all reasonable
 21 inferences in plaintiff’s favor. *Twombly*, 550 U.S. at 547. However, “[t]o survive a motion to
 22 dismiss, a complaint must contain sufficient factual matter . . . to state a claim to relief that is
 23 plausible on its face.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (internal citations omitted).
 24 Although “not akin to a ‘probability requirement,’” the plausibility standard asks for more than a
 25 sheer possibility that a defendant has acted unlawfully. *Id.* “Where a complaint pleads facts that are
 26 ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between possibility and
 27 plausibility of entitlement to relief.’” *Id.*

1 A federal court can exercise diversity jurisdiction under 28 U.S.C. § 1332 only when (1) the
 2 matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and (2)
 3 there is complete diversity between the parties. *See* 28 U.S.C. § 1332. Where the plaintiff originally
 4 files in federal court, “the amount in controversy is determined from the face of the pleadings.”
 5 *Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1106 (9th Cir. 2010)
 6 (internal quotations omitted). “To justify dismissal, it must appear to a legal certainty that the claim
 7 is really for less than the jurisdictional amount.” *Id.*

8 **I. Amount in controversy**

9 The court finds that it does not “appear to a legal certainty that the claim is really for less than
 10 [\$75,000].” *Geographic Expeditions, Inc.*, 599 F.3d at 1106. The first amended complaint asserts
 11 that defendants wrongfully and deliberately clouded plaintiff’s title on three parcels of Clark County
 12 real estate. Plaintiff further asserts that the lis pendens has caused him to lose or suffer diminished
 13 offers to purchase the real property. Plaintiff further requests general damages, special damages,
 14 punitive damages, and attorneys’ fees and costs, all in excess of \$75,000. Accordingly, the face of
 15 the pleadings do not establish “to a legal certainty” that the claim is for less than \$75,000. *Id.*
 16 Therefore, diversity jurisdiction is proper.

17 **II. Privileged communications**

18 Defendants argue that the communications in the lis pendens are absolutely privileged
 19 because they were made in the context of pending litigation. Therefore, the complaint should be
 20 dismissed. Plaintiff responds that there is no Nevada lawsuit connected to the notice of lis pendens,
 21 and the existence of the unrelated Texas action does not insulate defendants from liability.

22 Nevada follows the “long-standing common law rule that communications [made] in the
 23 course of judicial proceedings [even if known to be false] are absolutely privileged.” *Circus Circus*
 24 *Hotels v. Witherspoon*, 99 Nev. 56 (1983). “When the defamatory communication is made before
 25 a judicial proceeding is initiated, it will be cloaked with immunity only if the communication is made
 26 in contemplation of initiation of the proceeding.” *Fink v. Oshins*, 118 Nev. 428, 433 (2002) (internal
 27 quotation omitted). While no published Nevada case has considered the litigation privilege in the
 28

context of a lis pendens, other jurisdictions have found that the privilege does not extend to a lis pendens filing unrelated to pending or proposed litigation. *See, e.g., Ringier America, Inc. v. Enviro-Technics, Ltd.*, 284 Ill. App. 3d 1102, 1105 (1996) (applying the privilege only when the underlying litigation “makes allegations affecting some ownership interest in the subject property”); *Duncan Family Trust v. Chesapeake Exploration, LLC*, 2008 WL 5272497, at *2 (E.D. Tex. 2008). *But see Bullivant Houser Bailey PC v. Eighth Judicial Dist. Court of the State of Nevada*, 2012 WL 1117467 (Nev. March 30, 2012) (unpublished decision) (finding that the litigation privilege applies when a lis pendens is filed during the course of litigation).

Here, defendants have not initiated any legal proceedings involving the subject of the lis pendens. Further, defendants have not alleged that they made the communication in good faith “contemplation of initiation” of proceedings related to the lis pendens. *See Fink*, 118 Nev. at 433 (limiting the privilege to communications made before judicial proceedings are initiated to communications “made in contemplation of the initiation of the proceeding”). Further, defendants have not demonstrated how the Texas case “makes allegations affecting some ownership interest in the subject property.” *Ringier America, Inc.*, 284 Ill App. 3d at 1105; *see also Duncan Family Trust*, 2008 WL 5272497, at *2. Therefore, defendants’ communications in the lis pendens are not absolutely privileged.

III. Compulsory counterclaims

Defendants argue that the claims in the instant suit are actually compulsory counterclaims in the Texas suit pursuant to Texas rules of civil procedure. Therefore, plaintiff is precluded from bringing these mandatory counterclaims in a separate lawsuit. (Doc. #16). Plaintiff responds that the instant claims are not compulsory counterclaims because they are unrelated to the transaction or occurrence at issue in the Texas case. (Doc. #21).

Like Texas Rule of Civil Procedure 97, Federal Rule of Civil Procedure 13(a) provides that a compulsory counterclaim “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.”

1 In determining what constitutes a compulsory counterclaim, the Ninth Circuit applies a
 2 “logical relationship” test to determine whether a claim and counterclaim arise out of the same
 3 transaction or occurrence. *Montana v. Goldin*, 394 F.3d 1189, 1196 (9th Cir. 2005); *see also In re*
 4 *Pinkstaff*, 974 F.2d 113, 115 (9th Cir. 1992). The operative question is “whether the essential facts
 5 of the various claims are so logically connected that considerations of judicial economy and fairness
 6 dictate that all the issues be resolved in one lawsuit.” *Pochiro v. Prudential Ins. Co. of America*, 827
 7 F.2d 1246, 1249 (9th Cir. 1987). Thus, courts must determine whether there is a substantial overlap
 8 between the facts necessary to the claim and counterclaim. *Id.* at 1251.

9 The Texas litigation asserts breach of contract and quantum meruit claims arising out of a
 10 dispute over personal services. Unlike the case at bar, the Texas litigation does not involve any
 11 claims related to real property located in Clark County. Further, the claims at issue in the case before
 12 this court did not arise until after the Texas case was initiated and defendants filed the lis pendens.
 13 Indeed, the only connection between the two cases is defendants’ admittedly false description in the
 14 lis pendens.

15 The “essential facts” of the claims in the two suits are not logically connected. *Pochiro*, 827
 16 F.2d at 1249. Therefore, plaintiff’s claims are not compulsory counterclaims. The claims in the
 17 instant case are properly before the court.

18 **IV. Failure to state a claim**

19 Defendants further argue that plaintiff has failed to state a claim for each of the four
 20 individual claims in the instant lawsuit.

21 **A. Slander of title**

22 Defendants argue that plaintiff has not pled a claim for slander of title because plaintiff has
 23 not alleged a special damage that can be recovered under Nevada law. (Doc. #16).

24 “The requisites to an action for slander of title are that the words spoken be false, that they
 25 be maliciously spoken and that the plaintiff sustain some special damage as a direct and natural result
 26 of their having been spoken.” *Rowland v. Lepire*, 662 P.2d 1332, 1335 (Nev. 1983). “[T]he costs
 27 incurred to prosecute the slander of title action itself do not constitute the required special damages
 28

1 and are not recoverable.” *Horgan v. Felton*, 123 Nev. 577, 586 n.23 (2007). “Special damages may
 2 constitute both impairment of the land’s vendibility as well as expenses sustained in removing the
 3 cloud on the plaintiff’s title caused by the false statement.” *Tai-si Kim v. Kearney*, 2012 WL
 4 194400, at *9 (D. Nev. 2012) (citing *Summa Corp v. Greenspun*, 98 Nev. 528 (1982)).

5 Here, the complaint asserts that the false lis pendens has damaged plaintiff “through the
 6 potential loss of a sale of some or all of the parcels and the resulting reduction in price offered for
 7 some or all of them.” (Doc. #12). Thus, plaintiff has pled an “impairment of the land’s vendibility,”
 8 which constitutes special damages. *Id.* Accordingly, dismissal of plaintiff’s slander of title claim
 9 is not proper.

10 **B. Abuse of process**

11 The elements of an abuse of process claim are: “(1) an ulterior purpose by the defendants
 12 other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper
 13 in the regular conduct of the proceeding.” *LaMantia v. Redisi*, 118 Nev. 27, 30 (2002) (internal
 14 quotations omitted). A notice of lis pendens “is filed without intervention of the judicial authority
 15 and brings neither the property nor any parties before the court. Since there is no process, there can
 16 be no abuse of process.” *Woodcourt II Limited v. McDonald Co.*, 119 Cal. App. 3d 245, 252 (1981).

17 Here, plaintiff’s abuse of process claim fails to state a claim upon which relief can be granted
 18 because the complaint does not establish “the use of [] legal process.” *LaMantia*, 118 Nev. at 30.

19 **C. Conspiracy**

20 “An actionable civil conspiracy is a combination of two or more persons who, by some
 21 concerted action, intend to accomplish some unlawful objective for the purpose of harming another
 22 which results in damage.” *Collins v. Union Federal Sav. & Loan Ass’n*, 99 Nev. 284, 303 (1983).
 23 “[U]nder Nevada law, an agent cannot conspire with her principal where the agent acts in her official
 24 capacity on her principal’s behalf and not as an individual for her individual advantage.” *Flynn v.*
 25 *Liner Grode Stein Yankelevitz Sunshine Regenstein & Taylor LLP*, 2010 WL 4121886, at *9 (D.
 26 Nev. 2010).

27 . . .

1 In *Flynn*, the court dismissed, without prejudice, a civil conspiracy claim against attorneys,
 2 finding that the complaint “does not set forth any factual allegations suggesting [the attorneys] were
 3 acting as individuals for their individual advantage.” *Flynn*, 2010 WL 4121886, at *9. Similarly,
 4 in the case at bar, the complaint does not allege that defendant McZeal was acting for his own
 5 individual advantage rather than as an agent of defendant Hill. (Doc. #12). Therefore, pursuant to
 6 Nevada law, plaintiff has failed to plead a claim for conspiracy upon which relief can be granted.
 7 See *Flynn*, 2010 WL 4121886, at *9.

8 **D. Racketeering**

9 To state a claim under Nevada’s RICO statute, a plaintiff must allege that the defendant
 10 “engag[ed] in at least two crimes related to racketeering that have the same or similar pattern, intents,
 11 results, accomplices, victims or methods of commissions, or are otherwise interrelated by
 12 distinguishing characteristics and are not isolated incidents” *Menalco v. Buchan*, 2010 WL
 13 428911, at *19 (D. Nev. 2010). The plaintiff must plead the two crimes relating to racketeering with
 14 specificity. *Brown v. Kinross Gold, U.S.A.*, 378 F. Supp. 2d 1280, 1287 (D. Nev. 2005). Further,
 15 the plaintiff must establish: “(1) the plaintiff’s injury flows from the defendant’s violation of a
 16 predicate Nevada RICO act; (2) the defendant’s violation of the predicate act directly and
 17 proximately caused the plaintiff’s injury; and (3) the plaintiff did not participate in committing the
 18 predicate act.” *Menalco*, 2010 WL 428911, at *19.

19 The complaint alleges that defendants committed the two following predicate acts: (1)
 20 recording a false and perjurious lis pendens, and (2) offering false evidence in the Texas litigation.
 21 (Doc. #12). The complaint further asserts that these acts injured plaintiff’s business or property.
 22 (Doc. #12). These allegations are supported by sufficient factual matter “to state a claim to relief
 23 that is plausible on its face.” *Iqbal*, 129 S.Ct. at 1949. Therefore, the plaintiff’s Nevada RICO claim
 24 is sufficiently pled, and survives defendants’ Federal Rule of Civil Procedure 12(b)(6) motion.

25 Accordingly,

26 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants Mark A. Hill
 27 and Marcellous McZeal’s motion to dismiss (doc. #16) be, and the same hereby is, GRANTED in
 28

1 part and DENIED in part. The second and third claims in plaintiff's first amended complaint are
2 dismissed.

3 DATED May 24, 2012.

4
5 
6 UNITED STATES DISTRICT JUDGE